



University of Kentucky
UKnowledge

Law Faculty Scholarly Articles

Law Faculty Publications

12-1981

Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase

Harold R. Weinberg

University of Kentucky College of Law, hweinber@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub



Part of the [Contracts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Harold R. Weinberg, *Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase*, 56 Tul. L. Rev. 1 (1981).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase

Notes/Citation Information

Tulane Review, Vol. 56, No. 1 (December 1981), pp. 1-41

TULANE LAW REVIEW

VOLUME 56

DECEMBER 1981

NUMBER 1

MARKETS OVERT, VOIDABLE TITLES, AND FECKLESS AGENTS: JUDGES AND EFFICIENCY IN THE ANTEBELLUM DOCTRINE OF GOOD FAITH PURCHASE

HAROLD R. WEINBERG*

In considering American common law doctrines shaped during the nineteenth century, commentators have advanced differing theories on the primary judicial criteria employed by judges. Recent studies have argued that these doctrines reflect a criterion of economic efficiency.¹ This work has been criticized for its failure to explain why there seems to be a correlation between efficiency and these decision rules or why judges might have preferred efficiency over other decisional criteria.² Other studies

* Professor of Law, University of Kentucky. The author's Fellowship in Law and Economics at the University of Chicago provided the opportunity to prepare an initial draft of this paper. It and subsequent drafts benefited from discussions with Tony Freyer, John Langbein, and at a University of Chicago Law and Economics Workshop. The paper also reflects insights gained through the author's participation on a panel that considered antebellum commercial law during the 1980 Annual Meeting of the American Society for Legal History. Valuable student research assistance was provided by Christopher Hill and Joseph La Vela.

1. An overview of the economic approach may be found in Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 281, 281-84 (1979).

2. See Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191, 220-22 (1980); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 307, 312 (1979); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 Minn. L. Rev. 1015 (1978). Other criticisms abound. See papers by Kronman, Rizzo, Fried & Driscoll in *Change in the Common Law: Legal and Economic Perspec-*

have proposed that many judicial doctrines announced before the Civil War were intended to facilitate or ratify major shifts in the distribution of social wealth.³ This article seeks to determine the extent to which antebellum American judges employed economic efficiency as a criterion in formulating decision rules applicable to disputes between the owners and good faith purchasers of goods.⁴ It necessarily also considers the possibility of other judicial criteria including the redistribution of wealth.

The decisions selected for study generally arose in the following situation. A's goods come into the possession of B. After one or more additional transfers, the goods come to rest in the hands of C, a good faith purchaser. A then seeks to recover the goods (or their value) from C who was previously unaware of A's claim. Confronted with this situation, antebellum courts focused on the circumstances under which A and A's goods parted company.⁵ All permitted A to recover his goods when they had been stolen by B even if C would have been protected by the English doctrine of market overt. American courts developed the voidable title doctrine which permitted A to prevail over C when the goods had been taken from A by B through some, but not all, types of fraud. If A's transfer was to B as A's agent, recovery from C was dependent upon the application of principles of agency and estoppel.

In an earlier paper, this author employed economic analysis

tives, 9 J. Legal Stud. 189-427 (1980). It may be methodologically correct to test a theory by ascertaining its predictive power while ignoring its assumptions. See M. Friedman, *The Methodology of Positive Economics* in *Essays in Positive Economics* 1-43 (1966). But see Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, 39 Ohio St. L.J. 439, 467-72 (1978). But even the staunchest defenders of the economic approach admit an interest in a theory of judicial behavior that would explain why the common law evolved toward efficiency. See R. Posner, *Economic Analysis of Law* § 19.7 (2d ed. 1977) [hereinafter cited as *Economic Analysis*]; Landes & Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. Legal Stud. 367 (1980).

3. See generally M. Horwitz, *The Transformation of American Law 1780-1860* (1977) [hereinafter cited as *Transformation*].

4. Thus, this paper is not an addition to the literature which seeks to explain the origin of efficient common law through "invisible hand" models that are not dependent on a judicial predilection for efficiency. See Rubin, *Predictability and the Economic Approach to Law*, 9 J. Legal Stud. 319, 329 (1980).

5. Whether a particular purchaser was entitled to good faith purchaser status was also an issue in some of the cases. See, e.g., *Fawcett, Isham & Co. v. Osborn, Adams & Co.*, 32 Ill. 411 (1863). The classic study of this pattern is contained in Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 Yale L.J. 1057 (1954).

to explain this pattern of purchaser protection.⁶ Significant theoretical considerations in this study included each decision rule's impact on the demand for and supply of illegitimate goods in the marketplace and the comparative efficiency of owners and good faith purchasers with respect to their ability to prevent the risk that goods would move from the former class to the latter. However, the earlier paper analyzed the pattern under modern-day conditions and did not consider whether it was the product of judges who sought to announce efficient decision rules. This paper explores the pattern's antebellum roots.⁷

MARKETS OVERT

The market overt doctrine reached its fullest English development by the sixteenth century. It matured in a feudal and agrarian society in which periodic and carefully controlled chartered or customary markets and fairs provided significant opportunities for trade.⁸ Blackstone provided a description of the doctrine:

[P]roperty may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore, the general rule of law is . . . that all sales and contracts of any thing vendible, in fairs and markets *overt* . . . (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose . . . were tolls established in markets, viz. to testify the making of contracts But if my goods are stolen from me, and sold, out of market overt, my property is not al-

6. Weinberg, *Sales Law, Economics, and the Negotiability of Goods*, 9 J. Legal Stud. 569 (1980) [hereinafter cited as *Sales Law*].

7. The author makes no claim of methodological purity. See note 2 *supra*. It was an interest in the pattern of purchaser protection which led to a preliminary review of the cases and history. This, in turn, led to the writing of *Sales Law*, *supra* note 6, the completion of which made it possible to complete this paper.

8. See generally 5 W. Holdsworth, *A History of English Law* 104-05 (2d ed. 1937); T. Plucknett, *A Concise History of the Common Law* 665 (5th ed. 1956); 2 F. Pollock & F. Maitland, *The History of English Law* 154 (2d ed. 1899); M. Postan, *The Medieval Economy and Society: An Economic History of Britain 1100-1500*, at 183, 207-09 (1969); Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 Colum. L. Rev. 375, 380 (1908) [hereinafter cited as *Market Overt*]; Pease, *Market Overt in the City of London*, 31 L.Q. Rev. 270 (1915) [hereinafter cited as *City of London*].

tered, and I may take them wherever I find them [I]f the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme-covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby By which wise regulations the common law has secured the right of the proprietor in personal chattels from being devested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.⁹

An additional justification for affording limited negotiability to goods can be found in Coke, who wrote that "the common Law did hold it for a point of great policie, and [advantageous] for the Commonwealth, that Faires and Markets overt should be replenished and well furnished with all manner of commodities . . . for the necessary [sustenance] and use of the people."¹⁰ Markets and fairs were so beneficial that it was essential "to encourage men thereunto."¹¹

Blackstone and Coke also described two exceptions to the doctrine, both reflecting the impact of property crime.¹² First, if a thief was prosecuted to conviction the owner was entitled to the return of his goods.¹³ Second, there were statutory formalities that had to be complied with in order to pass title to horses. Coke explained the first exception as intended to encourage the owner to pursue the felon so that he might be punished. He believed that the "old rule, *Caveat emptor*" was preferable in the "rare case" where the exception would result in a loss to a good

9. 2 W. Blackstone, Commentaries 449-55 (Bell ed. 1771) [hereinafter cited as Commentaries] (emphasis in original). Blackstone was influential in America during the eighteenth and nineteenth centuries. See L. Friedman, A History of American Law 88-89, 98 (1973) [hereinafter cited as History of American Law]. Payment of a toll, although it would tend to show that a sale actually occurred with the knowledge of an official of the market or fair, and thus go to the bonafides and openness of the sale, was generally not mandatory to the protection of a purchaser in market overt. *Market Overt*, *supra* note 8, at 378-79.

10. 2 E. Coke, The Institutes of the Lawes of England 713 (1642).

11. *Id.*

12. See generally Crime in England 1550-1800, at 49-51, 60 (J. Cockburn ed. 1977).

13. Commentaries, *supra* note 9, at 449-50. See generally *Market Overt*, *supra* note 8, at 378-83; Brickey, *The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis*, 33 Vand. L. Rev. 1101, 1116, 1122-24, 1132 (1980).

faith purchaser.¹⁴ Coke's discussion also indicates that, in general, owners were expected to minimize the risk that stolen goods might pass into the hands of good faith purchasers by reclaiming them before they were sold. Stolen horses were the subject of the second exception because even vigilant owners could not act fast enough to prevent their sale in some distant market or fair.¹⁵

Blackstone's and Coke's statements suggest an intuitive understanding of economic values, many of which were to be considered by antebellum judges deciding whether the market overt doctrine would be received in America.¹⁶ Their calculus reflects risks connected with the theft and the good faith purchase of stolen goods and the possibility that these costs might be reduced by both owners and purchasers through the adoption of protective measures. Their statements also recognize how a decision rule governing disputes between owners and good faith purchasers might affect criminal and legitimate commercial activity. All these considerations provide the ingredients for an economic rationale for or against good faith purchaser protection. Gains from trade must be balanced against the costs of increased criminal activity. The relative capacities of owners and good faith purchasers to reduce the risk that stolen goods might pass from the former group into the hands of the latter must also be considered.

The market overt doctrine received much attention in antebellum America.¹⁷ The doctrine was described in American edi-

14. 2 Coke, *supra* note 10, at 714.

15. *Id.* at 716-17.

16. Concerning the importance of economic values in pre-nineteenth century English law, see generally Williams, Book Review, 25 U.C.L.A. L. Rev. 1187, 1200-05 (1978); W. Letwin, *Law and Economic Policy in America 19-51* (1965). The English judges who formulated the market overt doctrine may also have had distributional or political motivations. The Crown and grantees of market or fair franchises sometimes benefited from market activity through the receipt of tolls and fees. See note 9 *supra*. And well furnished markets may have helped to preserve the social status quo by attracting adequate food supplies to medieval manors and towns. See *Market Overt*, *supra* note 8, at 376-79; *City of London*, *supra* note 8, at 271-73, 279-80; V. Mund, *Open Markets* 36-38 (1948) [hereinafter cited as *Open Markets*]. English courts limited the doctrine to its sixteenth century scope, perhaps because of the decline of the market and fair system which gave it birth. See *Market Overt*, *supra* note 8, at 382-83; *Open Markets*, *supra* this note, at 59-73; *History of American Law*, *supra* note 9, at 232. The doctrine remains a part of English law. See *Sale of Goods Act*, 1893, S. 22.

17. The possibility of the application of the market overt doctrine in colonial

tions of Blackstone and in *Lex Mercatoria Americana*,¹⁸ the first American commercial law treatise. In 1780, the Pennsylvania General Assembly enacted a statute declaring that "no sale of any stolen horse . . . shall be deemed a public sale in market overt, so as to change the property thereof."¹⁹ In 1812, Thomas

America is intriguing. Unfortunately, much colonial law has been lost or is inaccessible. See generally History of American Law, *supra* note 9, at 29-32. Undoubtedly there were colonial versions of the eternal dispute between owner and purchaser of stolen goods, and it would not be surprising if the question of ownership was resolved under English doctrine. See C. Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America 1625-1742*, at 69-71, 220-22, 381-82 (1938) [hereinafter cited as *Cities*]. Trade ties and an English heritage insured that English commercial law would be influential in the American colonies, and the colonists desired imports, particularly finished goods, from England and the Continent. See *id.*; G. Haskins, *Law and Authority in Early Massachusetts* 2, 179 (1960); D. North, *Growth and Welfare in the American Past* 40-42 (1966) [hereinafter cited as *Growth and Welfare*]. But it is doubtful that attracting British or European merchants could have been a significant colonial motivation for adopting the doctrine. Imports and exports were largely funneled through Great Britain under the Navigation Acts, and the mother country would have been the natural and dominant source of trade even absent the policy of mercantilism. See G. Walton & J. Shepherd, *The Economic Rise of Early America* 156-61 (1979) [hereinafter cited as *Economic Rise*]. Colonial market laws also hint at adoption of the market overt doctrine. Regular markets or fairs were held in Boston and other towns as early as 1633. See S. Bruchey, *The Roots of American Growth 1607-1861*, at 26-31, 44-46, 107 (1968) [hereinafter cited as *American Growth*]. Colonial law established market and fair days after the English model. See *The Laws and Liberties of Massachusetts 1641-1691*, at 27, 100, 275 (1976); J. Hughes, *Social Control in the Colonial Economy* 130 (1976) [hereinafter cited as *Social Control*]; *Cities*, *supra* this note, at 192-95, 347-53. For example, the New York General Assembly enacted a law providing for markets and fairs that would include market courts to be conducted with "all Liberty's and free customs to such fairs appertaining or which ought or may appertain to the Usage and Customs of fairs held in England." *The Colonial Laws of New York* 298. See generally H. Johnson, *The Law Merchant and Negotiable Instruments in Colonial New York 1664 to 1730*, at 25 (1963). There is also a colonial judicial reference to a sale in market overt. See *Levy v. Shaver* (1751) reprinted in *Select Cases of the Mayor's Court of New York City 1674-1784*, at 548, 550 (Morris ed. 1935). Inferences from these sources do not establish that the doctrine was adopted in the colonies. The post-independence market overt cases do not refer to colonial legal doctrine, perhaps because it was viewed as irrelevant to the new nation. See generally G. Gilmore, *The Ages of American Law* 8-11 (1977) [hereinafter cited as *Ages*].

18. G. Caines, 1 *Lex Mercatoria Americana* 374 (1802). See also note 9 *supra*.

19. Law of September 23, 1780, ch. 908, § 7. This act regulated sales at public auctions. In *Hosack v. Weaver*, 1 Yeates 478 (Pa. 1795), the purchaser of a lost or stolen horse in a horse market argued that this statute demonstrated that there were markets overt in Pennsylvania prior to the passage of the act. The court and jury apparently agreed with the owner of the horse who countered that the quoted language was enacted out of an abundance of caution because there never had been markets overt. See note 36 *infra* and accompanying text. For a statement that the statute was enacted because the law was unsettled, see 2 Kent, *Commentaries on American Law* 324 n.a (4th ed. 1840) [hereinafter cited as *Kent's Commentaries*].

A Georgia statute provided that an owner should not lose title to a stolen horse. However, good faith purchasers were protected by a requirement that they be compen-

Cooper presumed that the general principles of the doctrine would prevail in Pennsylvania even though he was also aware that Chancellor Kent had declared that there were no markets overt in New York.²⁰ Most significantly, the doctrine was the subject of repeated litigation. By 1812, courts in Massachusetts, Pennsylvania, New York, Maryland and Vermont had considered and disapproved of the doctrine. By 1840, it had been rejected in additional jurisdictions including Ohio, Indiana, Kentucky and Virginia.²¹

These cases were decided during a period of tremendous economic and social change. After independence, America was still a land of great distances and slow communications with less than five percent of the population residing in urban areas.²²

sated for the amount paid for the horse if an owner's claim was made less than six months after the horse was stolen. Law of September 29, 1773, in Harberry & Crawford, Digest of Georgia Laws 1755-1800. This approach bears similarity to the civil law. See 1 M. Planiol, *Treatise on the Civil Law*, no. 2486 (12th ed. La. State L. Inst. trans. 1959).

20. Editor's Notes to the Institutes of Justinian 472-73, 617 (T. Cooper ed. 1812) [hereinafter cited as Cooper Notes]. Cooper's dogmatism is as notable as his varied interests. See I. Riley, *American Philosophy: The Early Schools* 407-08 (1958). He apparently was not aware of *Hosack v. Weaver*, 1 Yeates 478 (Pa. 1795), discussed in note 19 *supra*, which was not reported until 1817, or *Hardy v. Metzgar*, 2 Yeates 347 (Pa. 1798), which followed *Hosack* but was not reported until 1818. Contrary to the developing mainstream of judicial thought during this period, Cooper was biased against the doctrine of *caveat emptor*. See Cooper Notes, *supra* this note, at 610-11. See generally Transformation, *supra* note 3, at 60; Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1138, 1178-82 (1931); note 52 *infra*.

21. Eighteenth and nineteenth century American cases considering the doctrine include the following: *Ventress v. Smith*, 35 U.S. (10 Pet.) 161 (1836); *Rogers v. Huie*, 1 Cal. 429 (1851); *Worthy v. Johnson*, 8 Ga. 236 (1850); *Fawcett, Isham & Co. v. Osborn, Adams & Co.*, 32 Ill. 411 (1863); *Newkirk v. Dalton*, 17 Ill. 413 (1856); *Kitchell v. Vanadar*, 1 Black. 356 (Ind. 1825); *Lance v. Cowan*, 31 Ky. (1 Dana) 195 (1833); *Coombs v. Gorden*, 59 Me. 111 (1871); *Browning v. Magill*, 2 H. & J. 269 (Md. Ct. App. 1808); *Dame v. Baldwin*, 8 Mass. 517 (1812); *Southwick v. Harndell*, reprinted in II N. Dane, *General Abridgement and Digest of American Law* 286 (1823) [hereinafter cited as Dane's Abridgement]; *Towne v. Collins*, 14 Mass. 500 (1785); *Depew v. Robards*, 17 Mo. 580 (1853); *Nixon v. Brown*, 57 N.H. 34 (1876); *Bryant v. Whitcher*, 52 N.H. 158 (1872); *Hoffman v. Carow*, 22 Wend. 285 (N.Y. 1839); *Wheelwright v. Depeyster*, 1 Johns. 472 (N.Y. Sup. Ct. 1806); *Roberts v. Dillon*, 3 Daly 50 (N.Y.C.P. 1869); *Black v. Jones*, 64 N.C. 283 (1870); *Roland v. Gundy*, 5 Ohio 202 (1831); *Lecky v. McDermott*, 8 Serg. & Rawl. 500 (Pa. 1822); *Easton v. Worthington*, 5 Serg. & Rawl. 129 (Pa. 1819); *Hardy v. Metzgar*, 2 Yeates 347 (Pa. 1798); *Hosack v. Weaver*, 1 Yeates 478 (Pa. 1795); *Thomas v. Hess*, described in *id.* at 479; *Carmichael v. Buck*, 18 S.C.L. (10 Rich.) 332 (1857); *Arendale v. Morgan & Co.*, 37 Tenn. (5 Sneed) 703 (1857); *Sandford v. Wilson*, 2 Tex. Civ. Cas. 188 (Ct. App. 1884); *Griffith v. Fowler*, 18 Vt. 390 (1846); *Heacock v. Walker*, 1 Tyl. 338 (Vt. 1802).

22. Growth and Welfare, *supra* note 17, at 64-65; Economic Rise, *supra* note 17, at 42, 189-99; T. Cochran & W. Miller, *The Age of Enterprise: A Social History of Indus-*

Cities and towns offered trading opportunities including markets and fairs modeled after those of Great Britain. However, formalized trading, which never provided the sole or even the most important method of exchange, had begun to break down before the Revolution under the pressure of expanding internal settlement and commerce.²³ Much of the rural populace did not participate in any structured market on a regular basis.²⁴

Significant post-independence economic growth may have begun as early as 1790.²⁵ Its characteristics included a transition from household to factory production and an overall increase in manufacturing. Patterns of regional specialization in production and decentralized markets emerged along with improved transportation and expanding urban and rural populations. This process resulted in the formation of a national market economy which has been dated from 1825.²⁶ Property crime was viewed as a major and growing problem during this period. Thieves, burglars, confidence men and fences were particularly active in cities as disparate as Philadelphia and St. Louis. Urban residents were often more concerned with the recovery of their property than the apprehension of wrongdoers. Recovery became increasingly difficult because of criminals' mobility and the relative anonymity of cities.²⁷

The market overt cases reflect the times in which they were decided. A few of them involved theft by parties unknown, but less extreme situations were typical.²⁸ These included the wrong-

trial America 3, 8 (1961) [hereinafter cited as *Enterprise*]; *American Growth*, *supra* note 17, at 33-34, 94.

23. See note 17 *supra*. The operation of the Baltimore public market is described in *Browning v. Magill*, 2 H. & J. 269 (Md. Ct. App. 1808).

24. *Open Markets*, *supra* note 16, at 114; *Social Control*, *supra* note 17, at 130-31; *Cities*, *supra* note 17, at 192-95, 349-53.

25. *Economic Rise*, *supra* note 17, at 151; *American Growth*, *supra* note 17, at 84-91, 154-60.

26. This process enjoyed substantial public support. Thomas Jefferson became an advocate of development despite personal preferences to the contrary because it was what a substantial majority of the nation wanted. The Constitution of 1789 anticipated and furthered the formation of this market. See generally *American Growth*, *supra* note 17, at 96-98, 113-23, 128-33, 153-60; *Growth and Welfare*, *supra* note 17, at 54-56; *Economic Rise*, *supra* note 17, at 187-89.

27. See D. Johnson, *Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800-1887* at ch. 1-2 (1979) [hereinafter cited as *Urban Underworld*]; R. Wade, *The Urban Frontier* 87-91, 122-24, 271, 289-90 (1959).

28. Cases which did involve theft include *Towne v. Collins*, 14 Mass. 500 (1785); *Hoffman v. Carow*, 22 Wend. 285 (N.Y. 1839); *Hosack v. Weaver*, 1 Yeates 478 (Pa. 1795)

ful appropriation of a rented horse and livery by the renter; the wrongful sale of an employer's equipment or products by an employee; and the wrongful sale of a shipper's goods by the carrier.²⁹ Horses, horse drawn conveyances and oxen were often the subject of disputes between owners and purchasers.³⁰ Manufactured goods such as steel articles and bulk agricultural produce such as firkins of butter were also wrongfully appropriated.³¹ The unfortunate owners included farmers, operators of businesses and individuals who loaned their goods to less than worthy friends.³² The wrongdoer sometimes sold the goods directly to the purchaser at a public market.³³ Other times the goods were sold to merchants who dealt in goods of that type and who then publicly resold them to another purchaser.³⁴ Purloined goods were also sold in such nonmarket settings as a street in Pittsburgh or on a road near a Massachusetts country tavern.³⁵

A hypothesis that the market overt cases were decided by judges who employed efficiency as a decisional criterion would require two lines of proof: first, that the judges employed a calculus of economic values intended to minimize costs and maximize benefits; and second, that the cases turned, at least in part, on these values. Three of the earliest market overt case reports are helpful in testing this hypothesis because they ex-

(goods may have been lost). Chancellor Kent's discussion of the doctrine leaves doubt concerning whether it was ever applicable to goods taken by fraud or means other than theft. See 2 Kent's Commentaries, *supra* note 19, at 324. See also Case No. 224, 78 Eng. Rep. 98 (K.B. 1653). Cases involving fraud or agent wrongdoing were ultimately decided under other decision rules. See text at notes 62-133 *infra*.

29. See, e.g., *Kitchell v. Vanadar*, 1 Black. 356 (Ind. 1825); *Dame v. Baldwin*, 8 Mass. 518 (1812); *Southwick v. Harndell*, 2 Dane's Abridgement, *supra* note 21, at 286; *Hoffman v. Carow*, 22 Wend. 285 (N.Y. 1839); *Lecky v. McDermott*, 8 Serg. & Rawl. 500 (Pa. 1822); *Hardy v. Metzgar*, 2 Yeates 347 (Pa. 1798).

30. See, e.g., *Browning v. Magill*, 2 H. & J. 269 (Md. Ct. App. 1808); *Southwick v. Harndell*, 2 Dane's Abridgement, *supra* note 21, at 286; *Towne v. Collins*, 14 Mass. 500 (1785); *Roland v. Gundy*, 5 Ohio 202 (1831); *Hardy v. Metzgar*, 2 Yeates 347 (Pa. 1798); *Heacock v. Walker*, 1 Tyl. 338 (Vt. 1802). Slaves were also the subject of disputes between owners and purchasers. See, e.g., *Ventress v. Smith*, 35 U.S. (10 Pet.) 161 (1836).

31. See *Kitchell v. Vanadar*, 1 Black. 355 (Ind. 1825); *Dame v. Baldwin*, 8 Mass. 518 (1812); *Lecky v. McDermott*, 8 Serg. & Rawl. 500 (Pa. 1822).

32. See *Thomas v. Hess*, discussed in *Hosack v. Weaver*, 1 Yeates 478, 479 (Pa. 1795); *Heacock v. Walker*, 1 Tyl. 338 (Vt. 1802).

33. See *Dame v. Baldwin*, 8 Mass. 518 (1812); *Hosack v. Weaver*, 1 Yeates 478 (Pa. 1795); *Thomas v. Hess*, discussed in *Hosack v. Weaver*, *id.* at 479.

34. See *Browning v. Magill*, 2 H. & J. 269 (Md. Ct. App. 1808).

35. See *Southwick v. Harndell*, 2 Dane's Abridgement, *supra* note 21, at 286; *Lecky v. McDermott*, 8 Serg. & Rawl. 500 (Pa. 1822).

pressly referred to some of the economic values described by Blackstone and Coke.

The first of these reports, *Hosack v. Weaver*,³⁶ involved a lost or stolen horse discovered by the owner in the possession of a good faith purchaser. The horse was purchased in the Philadelphia public horse market after it had been shown for two or three market days. In charging the jury, the court distinguished Philadelphia markets from those in England as lacking any "ancient law or custom" protecting good faith purchasers.³⁷ The charge also contained a justification for this lack of protection:

We think these resolutions founded in honesty, and the soundest and best policy. . . . "They tend to the advancement of justice, to make men prosecute felons, and they will discourage persons from buying stolen goods, though in market overt; for under that pretence, men buy goods there for a small value of persons whom they have reason to suspect, which practise these resolutions will abate."³⁸

This language may illustrate the court's awareness that insulating good faith purchasers from owners' claims could reduce the costs of engaging in thievery. An owner would be less inclined to try to recover his stolen goods, and track down the thief in the process, if he knew that his efforts would be wasted in the event that the goods were found in the hands of a good faith purchaser.³⁹ Further, the court seems to have recognized that protecting good faith purchasers might enable purchasers who buy stolen goods under suspicious but colorably legitimate circumstances to cut off owners' claims. This could decrease the risk of this sort of purchase and, thereby, increase the demand for stolen goods.⁴⁰ However, the case for the application of an efficiency criterion in *Hosack* is not compelling.

Much of the language quoted above was taken by the court

36. 1 Yeates 478 (Pa. 1795).

37. *Id.* at 479. Concerning ancient customs and usages in American law, see generally Transformation, *supra* note 3, at 188-90.

38. 1 Yeates at 479, quoting J. Kelyng, A Report of Divers Cases in Pleas of the Crown 48 (1708).

39. See *Davis v. Hampton*, 4 Mart. (n.s.) 288, 291 (La. 1826). *Hoffman v. Carow*, 22 Wend. 285, 295, 318-20 (N.Y. 1839) (opinions of Senators Edwards and Verplanck). See generally *Sales Law*, *supra* note 6, at 580-83.

40. See generally *Sales Law*, *supra* note 6, at 574-79; W. Story, *Sales of Personal Property* § 194 (1847) [hereinafter cited as *Story on Sales*].

(with attribution) from an early eighteenth century English authority which described the statutory exception to the market overt doctrine applicable to instances in which the thief was prosecuted to conviction.⁴¹ Thus, it could be argued that the charge was solely a product of a formal and nonefficiency-oriented judicial approach which relied upon logical deduction from prior authority.⁴² Case and statute law might have provided the court with grist for formalism. A decision in the Common Pleas of Philadelphia County, described in *Hosack*, had resolved that a sale of goods at auction would not transfer title to the purchaser unless the seller had title.⁴³ And a Pennsylvania statute provided that "no sale of any stolen horse . . . shall be deemed a public sale in market overt, so as to change the property thereof."⁴⁴ The court could not apply the statute directly because the horse in question may have been lost, but might have applied it by analogy.

The second market overt report incorporating some of the economic values described by Blackstone and Coke is *Heacock v. Walker*.⁴⁵ It contains the charge to a Vermont petit jury in a case considering the rights of the owner of a horse who loaned it to his neighbor. The neighbor privately sold the horse to a good faith purchaser in return for the partial satisfaction of an antecedent debt. The owner subsequently located the horse and recovered possession through subterfuge. In responding to the purchaser's argument that he had obtained title through purchase in market overt, the judge appeared to recognize that it would be more costly for residents of Vermont to recover wrongfully appropriated goods before they passed into the hands

41. 1 Yeates at 479. The authority was J. Kelyng, A Report of Divers Cases in Pleas of the Crown 48 (1708).

42. The "formal style" is not explicitly policy oriented. It stands in contrast with the "grand style" which expressly weighs policy (which is not necessarily economic policy) and applies prior authority only to the extent of its reason. Karl Llewellyn's articulation of the two approaches in *The Common Law Tradition* (1960) is discussed in W. Twining, *Karl Llewellyn and the Realist Movement* ch. 10 (1973). The grand style is most often associated with case law before the Civil War and the formal style after, but examples of each can be found in all periods of American case law. See *Ages*, *supra* note 17, at 16-17.

43. 1 Yeates at 479, describing *Thomas v. Hess*. *Thomas* refers to sales in "public vendue" which is probably a reference to auction sales. See *Cities*, *supra* note 17, at 192.

44. Law of September 23, 1780, ch. 908, § 7. See note 19 *supra* and accompanying text.

45. 1 Tyl. 338 (Vt. 1802).

of good faith purchasers than for residents of England hundreds of years earlier:

The other [English] cases are of goods vended at certain fairs or statute markets: but it appears that these fairs and markets are held on stated days, that there are known officers attached to them, in whose books entries are made of the property exposed to sale. Thus from their very nature they become places where those who have lost property will naturally resort to find it; and if they neglect, there seems some shew of reason why they should not afterwards claim it from an honest purchaser.

But in this State we have no such city customs; no prescriptive rights to vend particular articles in particular places; no fairs or statute markets.⁴⁶

The statement that some English owners might "neglect" to find lost goods may imply that most English owners could recover their goods through searches that would be cost-justified by the recovery of their property. Searches would be costlier and recovery less probable in Vermont because of the absence of formal and exclusive markets and also, perhaps, because of the greater mobility of goods under antebellum conditions.⁴⁷ These considerations might have led the judge to believe that it was efficient to place the risk of a good faith purchase on English but not on Vermont owners. However, the quoted language is not certain evidence of the judicial application of rough notions of efficiency. It may only demonstrate formal recognition that American circumstances were different and that, as a result, the English cases were distinguishable.

A second indication of a possible judicial preference for efficiency in *Heacock* is the court's statement that

[t]he converse doctrine [protecting good faith purchasers] would tend to abridge that friendly intercourse among men which ameliorates society; for if the law is, that a man must consider, that every time he loans his horse to a poor neighbor to go to the mill, or to call aid to his wife in the hour of nature's difficulty, that he risks the sale of the property by the borrower, you will consider how far this will tend to restrain those acts of neighbourly kindness, which, when exercised by the opulent towards the poor, assume a portion of that charity

46. *Id.* at 341.

47. See *Sales Law*, *supra* note 6, at 581-84.

which is the ornament of christian and social life.⁴⁸

Perhaps this represents a judicial attempt to place an economic cost on the reduction in neighborliness that could be a consequence of a qualified owner's entitlement. Such a "moralism" might be incorporated into the formulation of an efficient decision rule.⁴⁹ However, the court's language is at least as suggestive of noneconomic social concerns and has the ring of bootstrap justification.⁵⁰

One puzzling feature of *Hosack* and *Heacock* and other market overt decisions is their failure to discuss the commercial impact of the decision rule under consideration in light of Blackstone's and Coke's statements that the protection of good faith purchasers' titles facilitated market trading.⁵¹ One would expect that antebellum judges dealing in economic values would reflect on this and compare the commercial costs and benefits of non-protection.⁵² For example, a judge might have reasoned that the protection of good faith purchasers would not produce signifi-

48. 1 Tyl. at 341.

49. But perhaps it should not be included. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1111-13 (1972).

50. Dictum in *Heacock* suggests the existence of markets overt in connection with sales regulated by statute such as execution sales. 1 Tyl. at 339. But see *Griffith v. Fowler*, 18 Vt. 390 (1846).

51. But see *Hoffman v. Carow*, 22 Wend. 285, 296-99, 315 (N.Y. 1839) (opinion of Senator Furman).

52. One might also have expected judges oriented toward economic values to have reasoned that nonprotection for good faith purchasers of stolen goods was consistent with the rule of *caveat emptor*. That doctrine was widely reputed to benefit commerce because it facilitated the rapid exchange of goods by not affording implied warranty of quality rights to buyers. See *History of American Law*, *supra* note 9, at 234-35; note 20 *supra*. Some of the market overt judges did mention *caveat emptor* as a justification for not protecting purchasers in title disputes with owners. See, e.g., *Hardy v. Metzgar*, 2 Yeates 347 (Pa. 1798). However, *caveat emptor* did not protect sellers of goods with defective titles. During the period in which American courts were holding against good faith purchasers in the market overt cases, they were also commencing to protect purchasers by holding that there existed an implied warranty of title if the seller was in possession of the goods at the time of sale. See *Defreeze v. Trumper*, 1 Johns. 274 (N.Y. Sup. Ct. 1806); cf. *Boyd v. Bopst*, 2 Dall. 79 (Pa. 1785); *Lanier v. Auld's Adm'r*, 5 N.C. (1 Murph) 138 (1806); 2 Kent's Commentaries, *supra* note 19, at 478. Possession was viewed as an inducement for the buyer to believe that the vendor was the owner and the act of selling an affirmation of title. Such an implied title warranty might place a cost on persons dealing in illegitimate goods. *Sales Law*, *supra* note 6, at 581. The market overt and warranty of title cases generally did not refer to each other. But see, e.g., *Fawcett, Isham & Co. v. Osborn, Adams & Co.*, 32 Ill. 411 (1863); *Worthy v. Johnson*, 8 Ga. 236 (1850).

cant benefits given the increasing levels of domestic trade achieved during the period in which reception of the market overt doctrine in America was uncertain.

The decision in *Wheelwright v. Depeyster*⁵³ does suggest, however, that an unqualified owner's entitlement might benefit commerce in a way consistent with widely held antebellum views concerning economic growth. In concluding that there were no markets overt in New York, Chancellor Kent stated that "[i]n the progress of society, property acquired such stability and energy, as to affect the subject wherever found, and to exclude even an honest purchaser, when the title of his vendor was discovered to be defective."⁵⁴ This language reflects the natural rights philosophy that property rights are a prerequisite for economic progress.⁵⁵ In his Commentaries, Chancellor Kent described the importance of personal property rights when he wrote that "when commerce and the arts have ascended to distinguished heights, [personalty] maintains its level, if it does not rise even superior to property in land itself, in the influence which it exercises over the talents, the passions, and the destiny of mankind."⁵⁶ Kent further espoused that exclusive rights in real and personal property led to the "cultivation of the earth," the "spirit of commerce," and other important attributes of civilization.⁵⁷

The unusual facts of *Wheelwright* provided an additional reason for protecting owners that was not founded in natural rights philosophy, but which harkens back to the reasoning in

53. 1 Johns. 472 (N.Y. Sup. Ct. 1806).

54. *Id.* at 479.

55. Many Americans believed that the right to property was a natural right. See W. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* 24-35 (1977) [hereinafter cited as *Pursuit of Happiness*]; *Urban Underworld*, *supra* note 27, at 41-42. An important dimension of the natural rights philosophy was the individual's right to the resources requisite to the creation of wealth and to the wealth created. It was believed that property was an incentive for efficient productive activity. See 2 *The Works of James Wilson* 592-93, 718-19 (R. McCloskey ed. 1967). Although contemporary thought typically centered on real property, it was natural to extend the importance of property to personalty such as horses, harvested crops, and other goods that would be necessary to exploit the land or that were the products of its exploitation. See *Pursuit of Happiness*, *supra* this note, at 92-93.

56. 2 Kent's Commentaries, *supra* note 19, at 317.

57. *Id.* at 319. Another market overt opinion in which the "natural" right to property was protected is *Heacock v. Walker*, 1 Tyl. 338, 342 (Vt. 1802), which is discussed at note 45 *supra* and accompanying text.

Hosack. The case involved the seizure of an American-owned coffee cargo by a French privateer. The cargo was condemned by a French prize tribunal and then purchased by Spanish merchants who subsequently resold it in Cuba to American good faith purchasers.⁵⁸ In concluding that the tribunal lacked power to transfer title to the coffee, Chancellor Kent noted that any hardship to the purchasers was justified because "requiring the purchaser of captured property to look at his peril to the title, and to derive it under a competent sentence, will tend to check the intemperate avidity and irregular proceedings of belligerent captors."⁵⁹ Thus, the opinion reflects an understanding that the frequency of forced transfers and the demand for unlawfully taken goods might be reduced if the goods could be rightfully reclaimed by the owner.

Like *Hosack* and *Heacock*, *Wheelwright* is not entirely susceptible to an efficiency oriented interpretation. Chancellor Kent based his conclusion of no markets overt in New York in part on the lack of a purchaser-protective usage in that state and on the "common sense" general sales law principle that no one can transfer more right to another than he has himself.⁶⁰ He also asserted that the doctrine was a Saxon institution which was not a part of the common law, implying that the rule was not received under the New York reception statute.⁶¹

VOIDABLE TITLES

Hosack, *Heacock*, and *Wheelwright* were decided during the earliest stages of post-independence economic growth.⁶² The unyielding owners' entitlement which they and other market overt cases announced had the virtue of certainty. It may also have imposed costs on wrongdoers, reduced demand for illegitimate goods, and provided an incentive for production. But the entitlement excused even the most careless owner and required good

58. They may have known that it was prize coffee. 1 Johns. 470, 470-72, 485.

59. *Id.* at 480. Chancellor Kent also noted that the effect of a sale in market overt was not strictly before the court. *Id.* at 485.

60. *Id.* at 480.

61. *Id.* See History of American Law, *supra* note 9, at 96-97; E. Brown, British Statutes in American Law (1776-1836), at 69-72 (1964). Blackstone and Coke both stated that the doctrine was part of English common law. See notes 9 & 10 *supra* and accompanying text. See generally *City of London*, *supra* note 8, at 275.

62. See *Enterprise*, *supra* note 22, at 3, 27-28; note 25 *supra* and accompanying text.

faith purchasers to determine in all cases whether goods had entered commerce through the efforts of a wrongdoer. A purchaser could not meet this burden without obtaining information concerning his seller's title or taking other protective steps. The cost of these measures would often exceed the purchaser's valuation of the risk of acquiring wrongfully taken goods with the result that the risk which the purchaser was compelled to assume was unavoidable in the economic sense.⁶³

The rate of American economic growth accelerated after 1815.⁶⁴ An increasingly dynamic and expansive domestic commerce resulted from many factors including the advent of canals and steamboats which enhanced communication and transportation. Innovations such as the cotton gin improved productivity in agriculture. There were substantial increases in population and manufacturing. One might hypothesize that this growth accelerated the pace and increased the impersonality of commercial activity, making it even more costly for good faith purchasers to efficiently reduce the risk of acquiring illegitimate goods.⁶⁵

Purchasers who had the misfortune of acquiring such goods could be expected to continue turning to the courts for some means to avoid the rigors of an unqualified owners' entitlement.⁶⁶ The courts might have been sympathetic to their plight, at least in cases where the owner could have efficiently prevented his loss or recaptured the goods before they reached the purchaser and in which any aggravating impact on illegitimate activity seemed minimal.⁶⁷ The emergence of the antebellum voidable title doctrine provides support for this hypothesis and for a theory of nineteenth century legal formalism which is con-

63. See *Sales Law*, *supra* note 6, at 584-85. For example, consider the plight of the purchaser in *Browning v. Magill*, 2 H. & J. 308 (Md. Ct. App. 1808). He bought a horse, probably stolen, in a Baltimore public market. The seller was authorized by the corporation of Baltimore to sell horses. The market space was established by law. The sale was during official market hours. The purchase was in compliance with all regulations of the market. The court affirmed that there were no markets overt in Maryland.

64. See *American Growth*, *supra* note 17, at 141-77; *Growth and Welfare*, *supra* note 17, at ch. 6.

65. See generally *Sales Law*, *supra* note 6, at 583-84. The shift to a more impersonal mercantile community is discussed in T. Freyer, *Forums of Order: The Federal Courts and Business in American History* 13-14 (1979).

66. See generally Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65 (1977).

67. See generally *Sales Law*, *supra* note 6, at 588-90.

sistent with a judicial preference for efficiency.⁶⁸

The voidable title doctrine enabled courts to protect some good faith purchasers without dishonoring the idea of an unqualified owners' entitlement. The good faith purchaser would prevail if the court decided that the defrauded owner had *intended* to transfer title to the wrongdoer.⁶⁹ The owner could void this ill-gotten title and recover his goods so long as they remained with the wrongdoer or were transferred to non-good faith purchasers. However, the voidable title would become enforceable against the owner if the goods were acquired by a good faith purchaser. If the court decided that the owner had intended to transfer mere possession only and not title to the wrongdoer, then subsequent transferees could only obtain a void title which could not be converted to a good title under any circumstances.⁷⁰

In applying the voidable title doctrine, many courts simply reasoned that the owner either had or had not intended to trans-

68. Morton Horwitz has written that legal formalism can be entirely correlated with the successful establishment of legal doctrines that "maintained the new distribution of economic and political power" and "actively promoted a legal redistribution of wealth against the weakest groups in the society." *Transformation*, *supra* note 3, at 253-54. His is not the only theory extant. For example, Grant Gilmore has attributed the advent of formalism to judicial revulsion over having to enforce laws supportive of slavery and has also described a possible linkage between nineteenth century formalism and laissez-faire economics. *Ages*, *supra* note 17, at 16, 36-39, 66. Concerning formalism generally, see note 42 *supra* and accompanying text.

69. See generally J. Benjamin, *A Treatise on the Law of Sale of Personal Property* § 433 (4th ed. 1884).

70. Legal incompetence and certain forms of aggravated fraud could also result in an obligation that was void, not voidable. See *Somes v. Brewer*, 19 Mass. (2 Pick.) 184, 203-04 (1824); *Whelan v. Whelan*, 3 Cow. 537 (N.Y. 1824). Incompetence might result from infancy or an adjudication of insanity. A deed might be void if the signer had been assured that he was signing a letter or some other, nonbinding writing and had no reasonable opportunity to discover the truth. "Consent" would be absent in either case. The origins of these doctrines must be left to another article. However, taking an economic perspective, one might suspect that in these cases there could be no assumption of value maximization through exchange. The incompetent or defrauded person would be incapable of determining whether the transaction enhanced his welfare. In addition, incompetents and victims of egregious fraud may have been incapable of risk prevention. See note 78 *infra* and accompanying text. The incompetency and egregious fraud cases fell into narrowly restricted and carefully defined categories, perhaps because of the high administrative costs of employing an individualized standard. Cf. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & Econ. 293, 300-01 (1975). Alternatively, they may have been restricted in order to minimize the areas in which contractual obligations might be tempered by considerations of substantive fairness. See *Transformation*, *supra* note 3, at 262-63.

fer title to the wrongdoer and held for or against the good faith purchaser accordingly.⁷¹ An occasional case traced the voidable/void dichotomy to the defrauded owner's right to elect his remedy against the tortfeasor.⁷² If he could elect to affirm the contract and sue for damages or rescind the contract and obtain restitution, then it followed that the contract was not void *ab initio* but was effective to pass title until the owner made his election.

Neither of these formalistic approaches expressed a judicial efficiency criterion. The former is cryptic and conclusory. The latter seems based on the manipulation of precedent and analogical reasoning.⁷³ However, a few of the voidable title cases, in particular the earliest cases from Massachusetts and New York, are more revealing.

Somes v. Brewer,⁷⁴ decided by the Supreme Judicial Court of Massachusetts in 1824, was the first case to consider the rights of a defrauded seller and good faith purchaser under the voidable title doctrine in that state. It dealt with realty, but Chief Justice Parker, the opinion's author, stated that the decision would have been the same for personalty.⁷⁵ The plaintiff sought to recover two parcels of land in Boston that he had been induced to sell through fraud and undue influence and without receiving any consideration. The purchaser, appropriately named Skinner, had been the plaintiff's guardian until the plaintiff reached majority. Skinner obtained title to the parcels which he subsequently resold to a good faith purchaser. The opinion, while reflecting the doctrinal need to base the decision on the plaintiff's consent, also seems to incorporate and express an eco-

71. See, e.g., *Titcomb v. Wood*, 38 Me. 561 (1854); *Shufeldt v. Pease*, 16 Wis. 689 (1863).

72. See, e.g., *Bell v. Lafferty*, 21 Ind. 411 (1863); *Mansell's Adm'r v. Israel*, 6 Ky. (3 Bibb) 510, 515 (1814).

73. A theory of value maximization through exchange might underlie the defrauded seller's right to elect his remedy. The seller could decide whether the contract was worthwhile despite the fraud after the relevant facts became known to him. Cf. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1, 18 n.49 (1978). But it would not explain why the seller should, in the case of a void title, be permitted to enforce his ownership rights against a good faith purchaser who acquired the goods through a subsequent transaction which, presumably, was also value-maximizing. Nor does it explain why the seller should not prevail against a good faith purchaser when the seller had "intended" to transfer title to the wrongdoer.

74. 19 Mass. (2 Pick.) 184 (1824). But see *Southwick v. Harndell* (1796) discussed in Dane's Abridgement, *supra* note 21, at 286.

75. *Id.* at 201.

conomic concept of negligence that requires risk to be placed on the more efficient risk preventer.⁷⁶

Now it is said, that it is contrary to a fundamental principle of property, that the owner shall be divested of it without his consent. The answer is, that in this case he has consented; and though this consent was unfairly obtained, so that he may vacate the contract against the party who procured it, yet the policy of law and the security of innocent purchasers, who confide in the lawful evidence of property in the party of whom they purchase, and particularly in his having actual possession, accompanied with the legal proofs of property under the seal of the former owner, require that titles thus obtained should not be disturbed. Nor is it inequitable, or incongruous with the rules of law applied to other cases of misfortune in relation to property. It is a general and just rule, that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint.⁷⁷

Under this approach, the plaintiff was clearly negligent and the defendant clearly not contributorily negligent. The plaintiff had permitted Skinner to obtain and record deeds to the parcels and to retain possession of the property for a substantial period of time. This created the substantial risk that Skinner would reconvey to a good faith purchaser. Justice Parker noted that a more prudent owner⁷⁸ could have reduced this risk through a

76. See *Sales Law*, *supra* note 6, at 583; *Economic Analysis*, *supra* note 2, at §§ 6.2-4. There is disagreement concerning the proposition that a modern concept of negligence based upon fault was employed by American judges early in the nineteenth century. The controversy is summarized at Williams, Book Review, *supra* note 16, at 1188-93.

77. 19 Mass. (2 Pick.) at 202.

78. The plaintiff, a man of "humble capacity," was adjudicated a spendthrift subsequent to the fraud. *Somes* was prosecuted by the guardian appointed at this time. *Id.* at 184-85, 203. The court would not permit the plaintiff's lack of intellectual prowess to prejudice the rights of the good faith purchaser. The plaintiff had been legally competent at the time of the fraud. In appraising his risk prevention capability the court, in effect, held the plaintiff to the standard of a "reasonable man" and not a special standard for

variety of relatively low cost means such as seeking the advice of friends or counsel before executing the deeds, refusing to acknowledge the deeds even after they had been signed, or by recording a notice of the defect in Skinner's title. He also reasoned that the plaintiff had created such an appearance of ownership in Skinner that a good faith purchaser would reasonably believe that only routine self-protective measures such as examining the deeds and the public record would be required.⁷⁹ These measures would not have revealed the fraudulent nature of the conveyance to Skinner. As a result, the risk could not be avoided at efficient cost by a good faith purchaser.

Additional evidence of the judicial application of an efficiency criterion in *Somes* may be found in the court's recognition that "[t]here would be no safety in deeds, records or any other evidence of property"⁸⁰ if the plaintiff were permitted to reclaim the Boston parcels from the good faith purchaser. Economics teaches that a clear definition of property rights lowers the costs of market transactions in realty and other forms of property.⁸¹ For example, a potential purchaser's cost of verifying his vendor's title is reduced if he can rely on a recording system. Certainty of title also encourages owners to invest in productive

less able persons. This approach might be justified by the administrative costs of applying a particularized standard. See note 70 *supra*. However, the court did not employ this justification. See note 81 *infra* and accompanying text.

79. The Massachusetts Supreme Judicial Court also seems to have been concerned with risk prevention when it decided the earlier case of *Buffington v. Gerrish*, 15 Mass. 156 (1818). However, the facts were quite different from those in *Somes*. The sellers were merchants who sold goods to Walker who had falsely represented that he was a merchant of good credit and the owner of two stores. The sellers asked for and received the name of a reference but they never made inquiries, relying instead on Walker's misrepresentations. After delivering his notes, Walker took possession of the goods which were subsequently attached by his creditors. The court intimated that the sellers might not recover their goods from a good faith purchaser because Walker's possession and appearance of ownership were with the sellers' consent. However, the sellers could recover under the facts before the court because

[t]he case here is very different. . . . [Walker] had done no act by which any of his creditors had been deceived with respect to this property; for their debts all existed before [Walker] acquired the possession. . . . They are in the same condition, as to their debts, they were in before the commission of the fraud; and they ought not reap the fruits of it, no credit having been given on account of this property.

Id. at 158-59.

80. 19 Mass (2 Pick.) at 203. See also the quotation in the text at note 77 *supra*.

81. Johnson, *Economic Analysis, The Legal Framework and Land Tenure Systems*, 15 J. L. & Econ. 259, 260-68 (1972).

improvements of their property. The goal of reduction of title uncertainty was reflected in legislation providing for title recordation which had existed continuously in Massachusetts since before 1640.⁸²

While Justice Parker must undoubtedly have understood the importance of certainty of title, it must be noted that he relied on John Marshall's opinion in *Fletcher v. Peck* which recognized the chilling of land transactions that could follow the invalidation of good faith purchasers' titles because of hidden defects in the original grants.⁸³ Justice Parker's reliance on this case raises the possibility that *Somes* turned on the formalistic adherence to precedent and the application of analogy. Considerations of risk prevention and the costs of insecure titles may have been nothing more than rhetorical buttressing. However, the court's use of the *Fletcher* case and other precedents significantly reduce this possibility.

Fletcher v. Peck involved a scandal in which members of the Georgia legislature had been bribed to vote for a land grant.⁸⁴ A subsequent legislature sought to rescind the grant but, in the meantime, the original grantees had sold much of the land to good faith purchasers. Justice Parker found the grounds for decision in *Fletcher* and many of the other authorities he discussed to be that "the delivery of the thing by the owner to one who has also the evidence of ownership by the act of the party transferring, gives such an appearance of property to the party

82. 6A R. Powell & P. Rohan, *The Law of Real Property* ¶ 912 (1980); J. Sullivan, *The History of Land Titles in Massachusetts* 83-84, 369, 382 (1801).

83. If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle were overturned.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133-34 (1810). See also Chancellor Kent's opinion in *Jackson v. Henry*, 10 Johns. 185, 197 (N.Y. Sup. Ct. 1813).

84. See generally C. Magrath, *Yazoo: Law and Politics in the New Republic* (1966).

in possession, that the purchaser under him shall not be disturbed by the antecedent fraud."⁸⁵

Massachusetts precedents considered in *Somes* held only that the defrauded owner was entitled to void the sale as against the fraudulent party. Justice Parker recognized that these cases had not reached the issue of the defrauded owner's rights against a good faith purchaser.⁸⁶ Other Massachusetts cases upheld the titles of good faith purchasers from fraudulent grantees in transactions intended to defeat the rights of the fraudulent grantors' creditors. This line of precedent was not, according to Justice Parker, analogous to the case before the court.⁸⁷ In *Somes* the grantor was defrauded, not a willing party to a fraud on others. Justice Parker believed that the significance of these precedents was, therefore, limited to their establishing that a defective title might be purged for the benefit of a good faith purchaser. He attributed the same limited significance to precedents from other American jurisdictions holding that a good faith purchaser could obtain good title through a fraudulent grantee in a transaction that violated legislation intended to invalidate fraudulent conveyances.⁸⁸

85. 19 Mass. (2 Pick.) at 201. This statement closely preceded the language quoted in the text at note 77 *supra*.

86. 19 Mass. (2 Pick.) at 191, 197. The cases were *Somes v. Skinner*, 16 Mass. 348 (1817) and *Bliss v. Thompson*, 4 Mass. 488 (1808).

87. 19 Mass. (2 Pick.) at 198-99. The cases were *Goodale v. Nichols* (1793) and *Sutton v. Lord* (1808), discussed in 1 Dane's Abridgement, *supra* note 21, at 631.

88. The cases were in conflict but the majority view favored the good faith purchaser. The Supreme Court of Errors of Connecticut had held that such a purchaser did not obtain a title good against the creditors of the fraudulent grantor. *Preston v. Crofut*, (Conn. 1811), reported in *Salmon v. Bennett*, 1 Conn. 525, 527 n.b (1816). Chancellor Kent had reached a similar conclusion in *Roberts v. Anderson*, 3 Johns. Ch. 371 (N.Y. Ch. 1818), but was subsequently reversed by the New York Court of Errors. *Anderson v. Roberts*, 18 Johns. 515 (N.Y. 1820). United States Supreme Court Justice Joseph Story, while on circuit in Rhode Island, also held for a good faith purchaser and against the creditors of the fraudulent grantor. *Bean v. Smith*, 2 F. Cas. 1143 (C.C.D.R.I. 1821) (No. 1174). These cases were also less than dispositive of the issue in *Somes* because of their concern with construing the language of the particular fraudulent conveyance legislation in issue.

Somes also discussed English common law and equity authorities. See 19 Mass. (2 Pick.) at 197-201. One English case which received attention was *Parker v. Patrick*, 101 Eng. Rep. 99 (K.B. 1793), discussed at notes 97-99 *infra* and accompanying text. Justice Parker was referring to it and the other English and American precedents when he wrote that

[t]he ground of these decisions . . . is, that the delivery of the thing by the owner to one who has also the evidence of ownership by act of the party transferring, gives such an appearance of property to the party in possession, that

The great weight of the internal evidence in *Somes* establishes it as a case that resisted the temptation of a mechanical resolution based on analogical reasoning from prior case law. Justice Parker certainly employed precedent and other authority to support his holding, but he took pains to reach a reasoned holding based on considerations of the risk to the good faith purchaser which the owner carelessly created and then carelessly failed to reduce, the difficulty which the purchaser would have had in learning that the original conveyances were tainted by fraud, and the effect that a contrary holding would have on the security of titles. The real significance of the precedents and other authorities employed resides in their discussion of some of the same risk and security of title considerations in different factual contexts, and in the reasoning which Justice Parker drew from them.

As previously indicated, *Somes* must be viewed as an aberration among the fraud cases. Many more turned on whether the owner had or had not intended to transfer title to the wrongdoer. A good faith purchaser would win if a title transfer had been intended. A New York case decided four years after *Somes*, *Mowrey v. Walsh*,⁸⁹ clearly reveals the doctrinal antecedents of this formalistic approach. *Mowrey* is of particular interest because the Massachusetts Supreme Judicial Court ultimately substituted its approach for that initially taken in *Somes*.

In *Mowrey*, a person named Stevens came to Mowrey's factory and presented a forged paper purporting to guarantee Stevens' credit. A clerk sold Stevens cotton cloth, giving him both possession of the goods and a bill of sale. Stevens promptly resold the cloth to Walsh from whom Mowrey sought recovery. When the action was tried, the jury found that Walsh was a

the purchaser under him shall not be disturbed by the antecedent fraud. 19 Mass. (2 Pick.) at 201-02. Skinner's possession and the registration of the deed brought the case within this principle. *Id.* at 202. Classic principles of equity jurisprudence protective of good faith purchasers of realty received little attention and, to the extent that they were considered, were given no significance beyond that described in the quoted language. See generally 1 Story, Commentaries on Equity Jurisprudence §§ 61c, 108, 165, 381, 409-11, 434, 436 (3d ed. 1843). This appears to be consistent with the observation that American courts did not feel constrained by the confines of the classic doctrine which was also significantly affected by the prevalence of recording acts. See 2 Pomeroy, Equity Jurisprudence §§ 735-736 (3d ed. 1905). See also History of American Law, *supra* note 9, at 130.

89. 8 Cow. 238 (N.Y. Sup. Ct. 1828).

good faith purchaser.

The judge in *Mowrey* concluded that the litigants had conceded that no title would pass from an owner when his goods were taken feloniously, but differed as to whether a felony had been committed. The outcome of the case would turn on the distinction between felonious and nonfelonious crime because, as the court noted, Chancellor Kent's opinion in *Wheelwright* precluded the possibility that a felonious title could be cleansed through sale in market overt.⁹⁰ Larceny, the only felony that could conceivably have been committed, was defined as "the wrongful, or fraudulent taking or carrying away by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner."⁹¹ Thus, larceny was a crime against possession.

English courts had concluded that the crime of larceny was not limited to theft, but extended to voluntary transfers of possession induced by a wrongdoer with fraudulent intent.⁹² An important English case had involved the rental of a horse for a few hours from a livery operator by a person who, at the time of the rental, intended to sell the horse. Larceny had been committed because "the parting with the property had not changed the nature of the possession, but that it remained unaltered in the [owner] at the time of the conversion."⁹³ In other words, because the renter actually intended to steal the horse, his obtaining possession was trespassory and the crime of larceny had been committed.⁹⁴

Subsequent English cases, discussed in *Mowrey*, considered fact situations more similar to that before the court and found them to be nonlarcenous. In one, an owner agreed to sell his horse to an acquaintance for eight pounds.⁹⁵ The buyer falsely

90. See notes 53-57 *supra* and accompanying text.

91. 8 Cow. at 242.

92. See generally Beale, *The Borderland of Larceny*, 6 Harv. L. Rev. 244 (1892).

93. *Rex v. Pears*, 168 Eng. Rep. 208, 209 (K.B. 1779).

94. See F. Pollock & R. Wright, *Possession in the Common Law* 131-32, 218-20 (1888).

95. *Rex v. Harvey*, 168 Eng. Rep. 335 (K.B. 1787). The wrongdoer in this case had been indicted for felony. However, the case could not properly be placed in the felony category of crimes punishable by death or forfeiture because larceny had not been committed and because false pretences was not a felony. See R. Perkins, *Criminal Law* 249-

promised to return with payment as he mounted the horse and rode off. The court ruled that the wrongdoer was not indictable for larceny because the delivery was unconditional and title had passed. In another English case the wrongdoer offered to pay a manufacturer for a piece of black silk if it was delivered to the wrongdoer's home later that day.⁹⁶ The goods arrived at the appointed time and the wrongdoer paid by a draft which subsequently proved to be forged. It was held that no felony was committed because the owner had intended to part with possession and title. The court in *Mowrey*, relying on the authority of these and like English cases, determined that Stevens had not committed larceny because Mowrey intended to transfer all his rights in the cotton cloth to Stevens. It followed that Stevens could convey this title to Walsh.

The *Mowrey* court found additional English authority to support the ultimate conclusion that Walsh could not be required to return the cloth. In a case decided at King's Bench, goods had been obtained from the defendant through fraud and then pawned to an innocent pledgee for value.⁹⁷ After the criminal was convicted, the defendant regained possession of the goods on authority of a statute providing that goods taken by felony could be restored to the owner by means of writ of restitution if the injured party procured the conviction of the wrongdoer by indictment.⁹⁸ The pledgee successfully recovered the goods from the defendant because this statute was inapplicable. The criminal had been convicted of false pretences which was not a felony. New York did not have a comparable statute, but the court in *Mowrey* nevertheless found this English decision to be support for the ruling that Walsh was entitled to keep the goods.⁹⁹

50, 259 (1957).

96. *Rex v. Parkes*, 168 Eng. Rep. 409 (K.B. 1794). Two other cases referred to in *Mowrey* were *Rex v. Coleman* (1785) and *Rex v. Atkinson* (1778) both of which were discussed in *Rex v. Aickles*, 168 Eng. Rep. 250, 254 n.a (K.B. 1784).

97. *Parker v. Patrick*, 101 Eng. Rep. 99 (K.B. 1793).

98. 21 Hen. 8, C.11 (1529). See note 13 *supra* and accompanying text.

99. Apparently the only state that did have a comparable statute was Virginia. See 2 Kent's Commentaries, *supra* note 19, at 324, n.c; cf. *Robinson v. Skipworth*, 23 Ind. 311 (1864); *Hoffman v. Carow*, 22 Wend. 285, 297, 321-22 (N.Y. 1839) (opinions of Senators Furman and Verplanck).

Although the English authorities provided the main basis for the decision in *Mowrey*, the court also drew support from two earlier New York cases that had considered the rights of sellers of goods. In one, *M'Carty v. Vickery*, 12 Johns. 348 (N.Y. 1815), the

The switch by the Massachusetts Supreme Court from the risk allocative approach in *Somes* to the formalism of *Mowrey* took place in the case of *Rowley v. Bigelow*.¹⁰⁰ Justice Parker had intimated in *Somes* that fraud cases involving personalty might be more difficult to decide.¹⁰¹ *Rowley* demonstrates that he was indeed correct, and that practical limits upon the capacity of judges to employ an efficiency criterion led to the introduction of formalism in the fraud cases.

The defendant good faith purchasers in *Rowley* were Boston merchants who purchased a quantity of corn from one Martin. They received a bill of lading for the corn signed by the master of the schooner *Lion*, indicating that the corn was shipped by Martin and consigned to them. They also received an invoice and letter, both signed by Martin, which related to the sale. Martin, subsequent to his transaction with the defendants, presented himself as a merchant and obtained possession of corn from the plaintiffs by pretending that he would pay for it after it was delivered on board the *Lion*. The plaintiffs, who were New York merchants, were unable to obtain payment and gave notice of their claim to the defendants, but not before the defendants accepted Martin's draft. Plaintiffs also demanded delivery of the corn directly from the *Lion* which had by then arrived in Boston harbor. The master refused and transferred the corn to the defendants. In their action to recover the value of the corn, the plaintiffs introduced evidence that Martin made similar fraudulent purchases from other New York merchants at about the same time that he defrauded the plaintiffs and that he had no

plaintiff had sold wood to a buyer accurately named Fake. Both Fake and the guarantor of his note were probably insolvent. Plaintiff's verdict in an action of trespass against the person helping Fake take the wood was reversed because the wood had been delivered to Fake through a transfer of possession which was voluntary. In the second, *Hollingsworth v. Napier*, 3 Cai. R. 182 (N.Y. Sup. Ct. 1805), Napier agreed to sell cotton then in storage for cash to Kinworthy. For some reason a bill of sale and an order for the delivery of the goods were given to Kinworthy who had not paid for the goods. The court in *Mowrey* indicated that the purchase was "palpably fraudulent." Claiming he needed money, Kinworthy was able to resell the cotton to Hollingsworth quickly. The next day Hollingsworth presented the order and paid storage charges on the cotton which was then marked with his initials and returned to storage. Napier then obtained possession of the cotton and resold it. After upholding the jury's verdict that Hollingsworth was a good faith purchaser, the New York Supreme Court held that Napier's right *qua* seller to stop delivery of the goods *in transitu* was cut off when Hollingsworth obtained possession of the order for delivery, had the cotton marked and paid the storage charges.

100. 29 Mass. (12 Pick.) 307 (1832).

101. See 19 Mass. (2 Pick.) at 201-02.

reasonable expectation of being able to pay his many victims.

Chief Justice Shaw did not attempt to determine whether the plaintiffs or the defendants were the superior risk preventers, and instead focused on the intentions of the plaintiffs and Martin. He first ruled that the evidence established that Martin had purchased the corn by false pretenses. He had been insolvent and had no reasonable grounds to believe that he would be able to pay.¹⁰² Justice Shaw also found that the evidence demonstrated that the contract between the plaintiffs and Martin had been unconditional. They had not intended to delay title passage until payment and no usage of trade implied such a condition.¹⁰³ The good faith purchasers' ultimate triumph turned on the linkage of these findings:

The difference between the case[s] of property [obtained under facts like those in *Rowley*] and property taken by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none. . . .

The ground of exception in favor of [the good faith purchaser] is, that he purchased of one having possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud¹⁰⁴

The opinion, while citing *Somes* in support of its reasoning,¹⁰⁵ nevertheless clearly departed from the approach taken in that earlier case in favor of a formalistic rule, incorporating criminal and sales law title concepts, and holding that a good faith purchaser will be protected if the owner loses his goods through criminal behavior which does not constitute a felony.¹⁰⁶

102. 29 Mass. (12 Pick.) at 311.

103. *Id.* at 312.

104. *Id.* at 312-13.

105. The court also relied on the English case of *Parker v. Patrick* which is discussed at note 97 *supra* and accompanying text.

106. Justice Shaw did not consider the document of title in deciding that Martin received a voidable title and the defendants a good title. However, the plaintiffs challenged the defendants on the theory that their purchase was not for value or "*bona fide*" because the corn had not been purchased by Martin and was not on board the *Lion* when the bill of lading was issued. The opinion indicates that the bill became binding on Martin and the master of the *Lion* as soon as the corn was placed on board. Defendants' title through the bill, the court reasoned, "gives as valid and effectual a title to the goods, as could be obtained by an actual delivery of the goods themselves." 29 Mass. (12 Pick.) at 315. The opinion's uncertain discussion of the bill of lading illustrates the "floating and unsettled" characterization placed on the law relating to documents of title. 2 Kent's Commentaries, *supra* note 19, at 549. See generally L. Vold, Handbook of the Law of

The doctrinal foundations for this departure are readily ascertainable. *Mowrey*, which was cited by counsel for the defendants in *Rowley*, describes the English origins of the criminal law distinction between felonious and nonfelonious fraud that was incorporated into the American fraud cases. These cases, to the extent that they involved goods, were also part of an evolving and as yet ill-defined sales law which protected good faith purchasers and other third parties under some but not all circumstances.¹⁰⁷ Thus, the intentions of the plaintiffs *qua* vendors and Martin *qua* vendee as manifested by their agreement also had a bearing on the locus of title. Insight into why Justice Shaw preferred a formalistic, intent-oriented approach to one which seeks to identify the superior risk preventer may be gained by considering the difficulties that the latter approach would have entailed.

The facts and commercial context of *Rowley*, and most of the voidable title cases, were obviously very different from those in *Somes*. Commercial transactions in commodities such as the corn in *Rowley* or the cloth in *Mowrey* were necessarily conducted in higher volume and with greater rapidity than realty transfers and were unrecordable. This could explain why the facts in *Rowley* did not point to owner negligence as clearly as did the facts in *Somes*. The owners in *Rowley* had been tricked into delivering the corn to Martin, but they quickly discovered the fraud and seem to have acted expeditiously in seeking recovery of their goods and giving notice of their claims. The fact that other merchants were similarly defrauded also suggests the non-negligence of the owners. Under this view of the facts, the owners' level of risk prevention may have been optimal. The risk may have been economically unavoidable if its expected value was less than the costs of investigating Martin's honesty.

On the other hand, it is possible that the owners in *Rowley* were negligent. They might have been able to efficiently investigate Martin or, if they had acted a bit faster, recapture the

Sales 320-22 (1st ed. 1931). Justice Shaw also reasoned that the plaintiffs' common law rights of stoppage *in transitu* terminated when the corn was delivered on board the *Lion* to be shipped in Martin's name to the defendants. 29 Mass. (12 Pick.) at 313-14. See generally 2 Kent's Commentaries, *supra* note 19, at 543-46.

107. See, e.g., *Marston v. Baldwin*, 17 Mass. 606 (1822); *Hussey v. Thornton*, 4 Mass. 405 (1808). See generally 2 Kent's Commentaries, *supra* note 19, at Lecture XXXIX.

goods before they were sold to the defendants. Communications and transportation had become quicker and more regular since 1776. But these improvements would also have been a factor to be considered with respect to the purchasers' carelessness. They, like the owners, took Martin at face value. They had not relied on Martin's possession of the corn or any documentary evidence of ownership provided by the owners. Of course, the purchasers' negligence, like that of the owners, was far from certain. Their risk of acquiring fraudulent corn may also have been so small as to be unavoidable through cost-effective measures.¹⁰⁸ As a result of this ambiguity, identification of the better risk-preventer as required under *Somes* may have seemed impossible to Justice Shaw when he was confronted with the very different facts in *Rowley*. Either choice of owner or good faith purchaser would have been difficult to defend convincingly in a judicial opinion turning on the identity of the negligent party.¹⁰⁹

108. The next step in an efficiency-oriented approach to risk allocation might consider the insurance capabilities of owners and good faith purchasers. See *Sales Law*, *supra* note 6, at 585-86. This step might also have led to indeterminate results insofar as it considered self-insurance. Both plaintiffs and defendants in *Rowley* were merchants and, thus, may have had similar potentials for diversification. Concerning antebellum concepts of risk and insurance, see generally Transformation, *supra* note 3, at 226-27.

109. Two opinions decided by Justice Savage, who also decided *Mowrey*, also illustrate the difficulty of this determination. The first, *Root v. French*, 13 Wend. 570 (N.Y. Sup. Ct. 1835), is discussed at note 113 *infra* and accompanying text. It strongly sympathized with the plight of good faith purchasers. See also *Arnett v. Cloudas*, 34 Ky. (4 Dana) 299, 300 (1836); *Arendale v. Morgan*, 37 Tenn. (5 Sneed) 703, 713 (1857). Yet, in an opinion announced less than four months after *Root*, Justice Savage considered the rights of a carpet merchant who delivered some of his wares to a purchaser who was to cut off and pay for what he needed and return the rest. The purchaser returned the remnant but never paid. Instead, he sold the carpet along with other household furnishings to the defendant auctioneer and absconded. The jury found that the defendant was ignorant of any questionable circumstances. In support of his holding that the plaintiff should prevail because in New York the crime of false pretences had by then been made a felony by statute, Justice Savage wrote:

This construction is calculated to give additional security to the owners of personal property, and is not liable to the objection of unreasonably restraining its alienation I apprehend there never was any very good reason for the distinction [between felonious and nonfelonious fraud]. In very few cases does the *bona fide* purchaser know anything of the circumstances under which the fraudulent possessor obtained possession. In the present case, the circumstances would have been the same as to the pawn or pledge of the carpet, whether Simmons had obtained it either by an actual or constructive felony. The defendant made no enquiries, and received no information on that point, before making the advance.

Andrew v. Dieterich, 14 Wend. 31, 36-37 (N.Y. Sup. Ct. 1835) (emphasis in original). See also *Hoffman v. Carow*, 22 Wend. 285, 310-11 (N.Y. 1839) (opinion of Senator Furman).

The formal approach of *Mowrey* may have seemed quite attractive by comparison. It produced a winner and loser without the need to devote resources to a subtle, case-by-case effort to identify the superior risk preventer.¹¹⁰ Moreover, the formal approach came equipped with a safeguard. The market overt cases had described some of the evils which could result if good faith purchasers were permitted to obtain title to goods taken without the owners' consent. The costs of supplying stolen goods might decrease, the demand for these goods increase, and so forth. The criminal law distinction between felonious and nonfelonious fraud enabled courts to honor the idea that no person should be involuntarily deprived of the ownership of property.¹¹¹ Goods re-

Not all subsequent New York courts accepted this gloss on the false pretences statute or the conclusion that good faith purchasers were the right class to bear the risk. See *Malcom v. Loveridge*, 13 Barb. 372 (N.Y. App. Div. 1851) (If a person "parts with his property voluntarily, although deceived, he has by his own want of proper caution, it may be, put it in the power of his vendee to impose upon a subsequent purchaser, and should therefore sustain the loss."). *Id.* at 379-80. *Ash v. Putnam*, 1 Hill 302 (N.Y. Sup. Ct. 1841), was also highly critical of *Mowrey*. In that case the plaintiffs sold three boxes of books on credit to a firm under a misrepresentation of the firm's solvency. Plaintiffs learned of the firm's situation and immediately sought to reclaim the books. These efforts were frustrated when the defendant sheriff levied on the books on behalf of the firm's creditors. In holding that the plaintiffs' trespass action should have been submitted to the jury on the issue of whether there was such fraud as avoided the sale, the court went so far as to state that:

Mowrey v. Walsh is an anomaly; for there is no general principle in the law, that the equity of a *bona fide* purchaser from one destitute of title, shall overrule the prior legal right of the owner. To say that he is in fault, by parting with the possession; and, therefore, of the two innocent men, he ought to suffer; would authorize any one to purchase even from a bailee. But such is not the rule. It is the contrary, viz.: that, as between two equally innocent persons claiming either a legal or equitable right, his right which is prior in time, shall prevail. Beside, it is not true of one who has been fraudulently led to part with his possession, that this is his fault. It is but his misfortune.

Id. at 307 (emphasis in original). Chancellor Kent preferred the holding in *Ash* to those in *Mowrey* and *Rowley*. He believed that "with the exception of commercial paper, the rule is that he who has acquired no title can convey none." See J. Kent, 2 Commentaries on American Law 514 n.d (5th ed. 1844). See also *id.* at 551 n.b.

110. See *Saltus v. Everett*, 20 Wend. 267, 283 (N.Y. 1838), discussed at note 117 *infra* and accompanying text, in which it was stated that "[i]n order to decide in such conflicts between the claims of equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity."

111. There is no indication in the voidable title cases that the crucial distinction between felonious and nonfelonious fraud turned on a comparison of owner risks and risk prevention capacity. For example, the cases do not suggest that a horse renter faces a risk different in value or possesses relatively different capacity to prevent this risk than a horse vendor that sells on credit. See notes 92-96 *supra* and accompanying text. The value of the renter's risk may equal the probability of a wrongful transfer by the lessee

mained non-negotiable if acquired by those types of fraud that were conceived as being the most like theft.

Assuming this explanation for the prevalent formalism in the fraud cases is correct, why did antebellum jurists afford any measure of negotiability to fraudulent goods? An answer may begin with *Somes'* demonstration that courts appreciated the limited capacity of good faith purchasers for efficiently investigating the quality of their sellers' titles to land and recognized that a rule favoring defrauded owners could inhibit realty transactions. Good faith purchasers' title investigative capacity would have been even more limited for goods sold in a dynamic and impersonal market in which they often would not have dealt face-to-face with the wrongdoer. Lack of title protection for good faith purchasers of goods might also exert a chilling effect on transactions in goods.¹¹² A statement by the same judge who decided *Mowrey* suggests that these considerations did, indeed, underlie that case's formalistically crafted holding for the purchaser:

Possession of personal property is *prima facie* evidence of property. . . . The *bona fide* purchaser, therefore, is justified in considering the fraudulent vendee the true owner—such *bona fide* purchaser as the terms *bona fide* import, having no notice of the fraud; and considering the possessor as the owner, the *bona fide* purchaser is justified in purchasing such property and giving value for it He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit

times the present value of the income stream from future rentals over the life of the horse. See generally *Economic Analysis*, *supra* note 2, at §§ 6.2-3. The value of the vendor's risk may equal the probability of a wrongful transfer by the vendee times the sale price for the horse. There would not seem to be any important *a priori* difference between the value of these risks; and if the horses that are the subjects of the lease and sale are homogeneous, their present values to renter and vendor may be identical. Both renters and vendors might have little practical opportunity to investigate the honesty of their transferees. Both could reduce their risks by demanding, respectively, a security deposit or a downpayment. A comparison of the costs of such protection would have to include, for example, transactions costs resulting from negotiating these possibly "non-standard" terms. It is noteworthy that both renting and vending involve commercial transactions. Cf. *Gilmore, The Commercial Doctrine of Good Faith Purchase*, 63 *Yale L.J.* 1057, 1060 (1954) ("The ingenious distinction between 'no title' . . . and 'voidable title' . . . made it possible to throw the risk on the true owner in the typical commercial situation while protecting him in the noncommercial one.").

112. See generally *Sales Law*, *supra* note 6, at 591 n.84.

the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the *usual course of trade* materially rests.¹¹³

FECKLESS AGENTS

Antebellum courts protected owners' titles to stolen goods, but also protected good faith purchasers of goods taken through nonfelonious fraud. There is evidence that an intuitive concern for efficiency underlay these developments. There is also evidence that courts employed an extension of this calculus of costs and benefits in cases involving owners whose misplaced confidence in agents resulted in the acquisition of entrusted goods by good faith purchasers.¹¹⁴

Nineteenth century American merchants necessarily relied on the services of ship's captains, commission agents, salesmen and others in order to engage in a world-wide commerce. The successful selection and management of these persons may have been the most important prerequisite to commercial success.¹¹⁵ Yet many of the factors which made the use of agents increasingly necessary, such as growth in the range and complexity of commercial enterprise, also caused the policing of agent behavior to be extremely costly with the result that merchants were forced to place a high degree of trust in their employees. The opinions deciding title disputes over goods sold by feckless agents are, like the fraud cases, frequently couched in formal reasoning: An owner could not be deprived of his goods except by his own act; an agent could not possess greater title than his own qualified possession.¹¹⁶ But the opinion of Gulian Verplanck

113. *Root v. French*, 13 Wend. 570, 572 (N.Y. Sup. Ct. 1835) (emphasis in original). The case involved the sale on credit of a quantity of groceries to a retail grocer who resold them on the eve of bankruptcy with all his stock in trade to the defendant in satisfaction of a pre-existing obligation. The court held that the defendant was not a bona fide purchaser because the antecedent debt was not valuable consideration. For other New York case law subsequent to *Mowrey*, see note 109 *supra*.

114. See generally S. Williston, *Sales of Goods* §§ 311-30 (1909) [hereinafter cited as *Sales of Goods*] which collects many of the cases.

115. See American Growth, *supra* note 17, at 50-52, 67; Economic Rise, *supra* note 17, at 92; *The Legal Protection of Good Faith*, 1 Hunt's Merchant's Magazine 227-28 (1839).

116. See, e.g., *Williams v. Merle*, 11 Wend. 80 (N.Y. Sup. Ct. 1833).

in *Saltus v. Everett*,¹¹⁷ which became a leading case on the issue,¹¹⁸ reconciled a conflict between an owner who had selected a feckless agent and a good faith purchaser through the application of a cost-benefit calculus that reflected agency costs such as monitoring and considered the efficiencies obtainable through team production.¹¹⁹

The question in *Saltus* was considered "most embarrassing and difficult."¹²⁰ Everett had arranged for the shipment of pig lead from New Orleans on board the brig Dove under the command of Captain Collins. The Dove put in at Norfolk in distress and Collins took this opportunity to transfer some of the lead for his own account to the schooner Dusty Miller under the command of Captain Johnson.¹²¹ Johnson issued a bill of lading which indicated that Collins owned the lead. The lead eventually arrived in New York where it was sold by Collins to an intermediate firm that resold to Saltus & Saltus, a good faith purchaser. Their not unsurprising response to Everett's demands for the return of the lead or its value was that they had bought it, paid for it, and would not return it.¹²²

Gulian Verplanck recognized that the case before the New York Court of Errors was "of great importance and must fre-

117. 20 Wend. 267 (N.Y. 1838). Chancellor Walworth's much shorter opinion in *Saltus* relied on the felony/nonfelony distinction. Gulian Verplanck's published work on the law of contracts has been noted for its adaptation of contract law to market-economy realities. Transformation, *supra* note 3, at 181-83, 198. He theorized that a "correct" determination of price could be based only on individual preferences and willingness to pay.

118. See 2 Kent's Commentaries, *supra* note 19, at 325 n.b, 621 n.b; Sales of Goods, *supra* note 114, at §§ 284 n.84, 311 n.2, 421 n.86.

119. See Sales Law, *supra* note 6, at 590-91 & nn. 81 & 83.

120. Address by Charles Daly on Gulian Verplanck, reprinted in 39 Alb. L.J. 27 (1871). At one time English law protected the good faith purchaser from a feckless bailee. The owner's nonrecourse against the purchaser may have resulted from the lack of an appropriate form of action and not a policy favoring purchasers or trade. See generally O. Holmes, The Common Law 166-67, 169-70 (1881). Eventually the outcome of these cases under English law came to turn on the application of authority and estoppel principles. See Pickering v. Busk, 104 Eng. Rep. 758 (K.B. 1812). See generally J. Story, Commentaries on the Law of Bailments 79 (1st ed. 1832).

121. Another portion of the lead, not involved in the litigation, was sold to pay for repairs. Captain Collins may have had the inherent authority for this sale because of "pressing necessity." 20 Wend. at 284-85. See also Landes & Posner, *Salvors, Finders, Good Samaritans, and other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83, 108-09 (1978).

122. 20 Wend. at 269.

quently arise in a commercial community."¹²³ If Saltus & Saltus were to cut off Everett's claim, it would have to be because Everett had voluntarily "given to another such *evidence* of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal."¹²⁴ The consignee of goods possessing a bill of lading furnished by the consignor would have sufficient evidence to permit him to transfer the consignor's rights in the goods to an assignee. Apparent authority to sell might be found in an owner's assent to prior and similar sales by the agent, or even in the nature of the agent's business of selling.¹²⁵ In the absence of such evidence, Everett could not be divested by action of one entrusted with the lead for purposes of transportation. Gulian Verplanck believed that this rule of law served:

the great interests of commerce, in a state of such extensive foreign and domestic trade as ours, by protecting the property of the stranger, as well as our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution.¹²⁶

This rule placed good faith purchasers at peril.¹²⁷ They bore the risk of most agent misconduct even if they did not deal directly with the agent. Verplanck felt the rule was nevertheless justified because it was:

no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants and clerks, as well as of those who may have them stored for safe keeping, and their clerks, porters and servants.¹²⁸

Everett's claim to the goods was vindicated because he had not given Captain Collins documentary evidence of title or apparent authority to sell on his behalf.

123. *Id.* at 274.

124. *Id.* at 280 (emphasis in original).

125. As to the apparent authority of an agent engaged in selling, see *Cook v. Beal*, 14 N.Y. Super. Ct. Rep. (1 Bosworth) 497 (1857). See also note 106 *supra*.

126. 20 Wend. at 283.

127. See *id.*

128. *Id.* at 286.

Gulian Verplanck's opinion turned on this balancing of the costs and benefits of protecting owners who lost control of their goods through the unauthorized acts of their agents.¹²⁹ He understood what twentieth century economics would come to teach: the risk of agent misbehavior can be reduced through means such as investigating an agent's honesty or monitoring his conduct, but also that at some point the cost of these means would exceed the value of the risk.¹³⁰ Apparent authority and estoppel by indicia of ownership were tools to be employed in placing this risk on owners when their inefficient investigation or monitoring failed to reduce optimally the risk of feckless behavior that could result in a good faith purchase or when they intentionally accepted the risk. Voluntary acceptance would indicate that the owner considered the increased risk justified because of the benefits that would flow from the use of an agent clothed with indicia of ownership or authority to sell.

The good faith purchase of goods originating with feckless agents would often be unavoidable. The general placement of this risk on purchasers was justified under Verplanck's calculus because owners increased the output of their assets through the use of agents in team production. Placing the unavoidable risk of agent misconduct on owners would increase the costs of and thereby reduce the levels of owner production.

Verplanck's opinion also recognized that a decision rule for deciding feckless agent cases could not turn on owner consent to a transfer of title because such a transfer was never intended in the delivery of goods to a person *qua* agent or bailee. Thus, it was not possible to employ this requirement in order to safeguard against the evils that might result from legitimizing involuntary transfers such as an increase in the demand for wrong-

129. He decided the case on what he called "principles of general application." *Id.* at 274. The case turned on the principles quoted in the text which were drawn from civil and common law authorities. He also believed the rule enjoyed the virtue of certainty. See note 110 *supra*.

130. See also *Carmichael v. Buck*, 44 S.C.L. (10 Rich.) 332 (1857) in which the court stated that

[i]t will not do to say that, if the jury should regard Huggins as entitled to sell, then no owner of timber can trust it to a carrier without incurring the risk of loss. One obvious answer is, let the owner employ an honest or a responsible carrier; and another is, let him take care to show by some suitable means that the carrier is neither the owner nor an agent to sell.

Id. at 339.

fully appropriated goods. However, the requirement of a voluntary conference of apparent authority or indicia of ownership served the same protective function.¹³¹

The prevalence of the formal approach to judicial decision making in the feckless agent cases may be explained, as in the voidable title cases, by the difficulty of making and defending the choice of the superior risk preventer under particular circumstances.¹³² Doubtful cases were resolved in favor of owners because of the evils of legitimizing involuntary transfers and the importance of owners' use of their property in team production and then couched in formalistic reasoning.¹³³

131. 20 Wend. at 276, 279-80. The evils of permitting agents to defraud their principals is expressed in *Chism v. Woods*, 3 Ky. (Hard.) 740 (1808). In *Chism*, an owner had entrusted his horse to a bailee who made an unauthorized sale to a good faith purchaser. The court stated:

[A] breach of trust . . . cannot change the right of property The moral and social duties of every member of civilized society require that it should be so; otherwise, the incentives to cautious and circumspect dealing would be so far loosed as to give those who are barely honest, and only so according to municipal law, the advantage of those who are morally honest. Thus, the great security for personal property would be sapped; and a large portion of good offices and benevolences would be supplanted by the fear of having a loan, or other bailment of a personal thing, converted into an action for damages, instead of a return of the goods themselves.

Id. at 744. See generally Story on Sales, *supra* note 40, §§ 201-202.

132. A belief that the owner should not be protected under particular facts led some courts to indicate their dissatisfaction with the operation of the *Saltus* rule and to sometimes express a preference for older English doctrine which would have protected the good faith purchaser. See *Roberts v. Dillon*, 3 Daly 50 (C.P.N.Y. 1869); *Roland v. Gundy*, 5 Ohio 202 (1831); note 120 *supra*.

133. In *Parsons v. Webb*, 8 Me. 38 (1831), the plaintiff delivered his horse to an agent with authority to sell. The agent resold to the defendant in payment of the agent's pre-existing debt. The court found the choice between owner and good faith purchaser as the superior risk preventer a difficult one and seems to have based its holding for the plaintiff on the importance of property rights:

It is said the purchaser has been deceived; so has the plaintiff. It is said the plaintiff has reposed that confidence, which has been abused to the defendant's injury; true, and has not the defendant also reposed confidence unwisely? The mere possession of the horse gave *Read* [the agent] no right to sell him; and therefore the defendant should have ascertained what authority had been given to *Read* by the plaintiff. To adopt the reasoning of the counsel for the defendant, would be to deprive a principal of the power over his own property, if entrusted to the hands of an agent for sale; and leave him at the mercy of those who are disposed to injure him.

Id. at 41 (italics in original). See also note 132 *supra*.

CONCLUSION

The search for an efficiency criterion in antebellum good faith purchase of goods cases could easily continue. The split of judicial authority over whether conditional vendors should be permitted to recover goods sold by their vendees to good faith purchasers might provide additional evidence of a judicial preference for efficient resource allocation,¹³⁴ as might the law relating to the good faith purchase of other forms of personalty such as commercial paper.¹³⁵

Perhaps the search should never have been started. After all, is it not a bit absurd to believe that judges deciding cases just a few years after the publication of the *Wealth of Nations*¹³⁶ in 1776 would be concerned with economic efficiency? Their opinions suggest it is not. Antebellum judges, at least in the three sets of cases considered in this paper, did respond to the economic values they perceived by seeking to integrate them into the fabric of decision rules. Like the consumers and firms of microeconomic theory,¹³⁷ they could do this without formal training in economic concepts.¹³⁸ It would have been surprising to learn that judges were unconcerned with economic values in an era of judicial instrumentalism in which economic growth was a socially desirable policy.¹³⁹ However, the evidence also suggests that any greater claim of success in locating the "visible hand" of an efficiency criterion in the market overt cases would be overstating the case.

As demonstrated by *Hosack*, *Heacock* and *Wheelwright*, the

134. The cases are summarized in *Harkness v. Russel*, 118 U.S. 663 (1886). Cases deciding the priority of owners against other third parties such as creditors may also reveal evidence of an efficiency criterion. See note 79 *supra*.

135. Antebellum judges expressly recognized that commercial paper was different than goods because of the "peculiar necessities of currency and trade." *Saltus v. Everett*, 20 Wend. 267, 278 (N.Y. 1838); note 143 *infra*. See generally *Sales Law*, *supra* note 6, at 591 n.84.

136. A. Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* xi (Cannan ed. 1976).

137. See G. Becker, *Economic Theory* 25-26, 69 (1971).

138. See generally Landes & Posner, *Legal Change, Judicial Behavior, and The Diversity Jurisdiction*, 9 J. Legal Stud. 367, 367-68 (1980); note 16 *supra* and accompanying text.

139. See note 26 *supra*. See generally Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513-14, 519-25 (1974).

most transparent of the market overt decisions, the process of searching for evidence of a judicial preference for a wealth maximizing allocation of resources can be simultaneously rewarding and frustrating. The inquiry gains impetus from language suggesting consideration of economic values such as the costs of owner searches or the effects of purchaser protection on the demand for stolen goods. But the search may ultimately lose headway in the cross-currents of alternative explanations and the eddies of rhetorical ambiguity. Perhaps *Hosack* or *Heacock* actually turned on mechanical adherence to precedent or a convenient statutory analogy. Perhaps Chancellor Kent's main concern in *Wheelwright* was to strike a small blow for the rights of a weak and newly independent United States buffeted between two warring great powers.¹⁴⁰ His paean to private property does not necessarily equate with an exultation of efficiency. Natural rights incantations embellished many antebellum judicial opinions and may reflect concern over the redistribution of wealth instead of economic efficiency.¹⁴¹

Further, there are two aspects of the market overt decisions which must be acknowledged. First, it was necessary to consider three of the decisions in order to find a range of economic values. No single case considered all of them. Second, the possibility that courts deciding these cases were concerned with the difficulties facing owners searching for their stolen goods is not advanced when it is realized that one piece of hard data before each court was that the owner did manage to locate his property or, at least, a good faith purchaser.¹⁴²

Repeated explanatory successes can make a theory robust. The voidable title and feckless agent opinions contain more substantial evidence of a judicial preference for efficiency. *Somes* and *Saltus* each considered a broad range of economic values and the formalism of many of the cases in these sets is explainable in a manner consistent with the use of efficiency criteria. It seems likely that the strongest case for a nineteenth century ju-

140. American feelings ran high. See generally B. Perkins, Prologue to War: England and the United States 1805-1812 at 74-79 (1968).

141. See Transformation, *supra* note 3, at 100-01.

142. See also note 16 *supra*. None of the good faith purchase cases discussed in this article considered the possibility that an owner's right to recover from a purchaser might ultimately be lost through the operation of a statute of limitations. See generally *Shelby v. Guy*, 24 U.S. (11 Wheat.) 361 (1826).

dicial efficiency criterion will ultimately be based upon the cumulative evidence from a series of examinations of antebellum opinions in light of the relevant historical conditions combined with supporting inferences from the many studies demonstrating that common law decision rules can be best understood *as if* they were the products of an efficiency maximizing judiciary.

This article theorized that antebellum judges employed efficiency as a decisional criterion. It did not further consider the question of whether the decision rules announced were actually efficient under antebellum conditions. While the three sets of opinions studied disclose that some judges did exhibit in their decision making a concern for efficiency based on their perceptions of the conditions around them, these perceptions may have been incomplete, mistaken or biased with an inefficient decision rule the result.

Accounts of antebellum circumstances written by twentieth century historians generally coincide with the perceptions expressed in the opinions, but even accurate judicial perceptions of the various classes of costs and benefits of alternative decision rules would not insure that the rule adopted was actually efficient. Would qualifying owners' entitlements in order to protect good faith purchasers through feckless agents have actually imposed significant additional costs on the productive use of agents? Would the resulting social losses have been greater than the costs imposed by owner protection on good faith purchasers?¹⁴³ Additional information about antebellum commercial society and industrial organization could provide more certain answers to these sorts of questions.¹⁴⁴ Data concerning the

143. Or consider whether the protection of property in order to encourage productive effort necessarily points to a decision rule of non-negotiability. The possibility of owner reclamation of stolen goods from good faith purchasers may encourage hard work and investment by the former group. But it might discourage these same activities by the latter. Each group has risk-costs resulting from theft or the possibility of purchasing stolen goods and these costs can make either group's production less profitable. See *Sales Law*, *supra* note 6, at 570 n.7, 575, 583-86.

144. An interesting paper by Professor Tony Freyer presented at the 1980 Annual Meeting of the American Society for Legal History is an example of the sort of additional research that might be done. He considered efficiency and distribution in antebellum commercial paper law and broadened the base of knowledge concerning what was at stake in commercial paper disputes by studying insolvency case files, the identity of persons jailed for debt and other sources. See also Danzig, *Hadley v. Baxendale: A Study in The Industrialization of The Law*, 4 J. Legal Stud. 249 (1975).

familiarity of antebellum judges with these aspects of their world could also be useful, as might information concerning judicial backgrounds, selection, competence, politics and likely biases.¹⁴⁵ But we will never be certain of the actual efficiency of many legal rules under antebellum circumstances.¹⁴⁶

Their opinions suggest that the judges themselves may have been uncertain of the economic superiority of placing the title risk on the owner or good faith purchaser litigating a particular case. The formal manner of decision crafting was employed to disguise this uncertainty. But formalism also served to justify rules that were understood to work an efficient result in the majority of cases and to possess the further advantage of minimizing administrative costs.¹⁴⁷

The emergence of formalism as a consequence of the indeterminacy of the efficiency criterion in particular cases may have interesting implications. For example, a formal rationale turning on intent might take on a life of its own and be employed by courts long after the underlying calculus of economic values became inappropriate or obscured through the passage of time. This might explain why late nineteenth and twentieth century doctrine relating to the good faith purchase of goods has been characterized as displaying a "shameless manipulation" of intent.¹⁴⁸

145. Some antebellum judges had extensive commercial backgrounds which may have helped them to understand the economic consequences of their decisions. See the sketches of Jasper Yeates and Lemuel Shaw contained in the *Dictionary of American Biography*. See also note 117 *supra*. On the other hand, it is doubtful that antebellum judges were selected for their unalloyed dedication to efficiency. Consider the following statement by Daniel Chipman from the preface to volume one of *D. Chipman Reports*:

Gradual advances, however, were made towards an uniform system of Jurisprudence, greatly retarded by a frequent change of the Judges, and at times by high party excitement, when the Judges were appointed for a purpose far different from that of providing for an enlightened and impartial administration of justice. And we must ever be exposed to these evils so long as our present form of government shall remain; for let whatever party will prevail, it must be composed of men governed by like passions strongly excited.

1 *D. Chip.* 32 (1824).

146. The efficiency of legal rules under modern circumstances is often debatable. See generally, e.g., Jordan & Rubin, *An Economic Analysis of The Law of False Advertising*, 8 *J. Legal Stud.* 527 (1979); R. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978).

147. See *Economic Analysis*, *supra* note 2, at § 6.4.

148. See Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 *U. Chi. L. Rev.* 469, 475 (1963).

Implicit in this article is a theory of why antebellum judges chose efficiency as a decisional norm. At least in the sets of cases under consideration, there may not have been any other competing consideration that was as important or visible. Opinions such as *Saltus* demonstrate that owners and good faith purchasers were often members of the same commercial community. The same merchant could be an owner one day and a good faith purchaser the next. Barriers against entrance into the commercial class may not have been high with the result that the class was both broad and fluid.¹⁴⁹ It would have made no sense for a court to seek to redistribute or protect wealth for the advantage of one group and the disadvantage of the other. There may have been little else to base a decision on besides economic considerations which may have seemed inherently attractive in a century that has been noted for its efficiency in production.¹⁵⁰ Virtually all of the cases considered by this article involved property that was either a factor or a recent product of production at the time of its wrongful appropriation.

A judicial preference for justice or equity is stated in many of the opinions. The way in which these references are juxtaposed with discussions of economic values¹⁵¹ lends weight to the suggestion that there might be a relationship between concepts of what is efficient and concepts of what is just.¹⁵²

149. Professor Freyer's work suggests this conclusion. See note 144 *supra*. See also History of American Law, *supra* note 9, at 205-07; McClain, *Legal Change and Class Interests: A Review Essay on Morton Horowitz' The Transformation of American Law*, 68 Calif. L. Rev. 382, 394-96 (1980).

150. Growth and Welfare, *supra* note 17, at 31. There is no evidence that protection of the wealth of nonmarket traders (such as, for example, the fee or tax revenues of municipalities that operated market places) was a factor in the opinions. There was public demand for orderly market places, but this would have cut for and not against reception of the market overt doctrine. See generally R. Wade, *The Urban Frontier*, *supra* note 27; *Open Markets*, *supra* note 16, at 111-15 (1948). See also note 16 *supra*.

151. For example, Gulian Verplanck's statement quoted in the text at note 126 *supra* was immediately preceded by his statement that "[t]he rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply" *Saltus v. Everett*, 20 Wend. at 283. See also notes 83 and 88 *supra* and the language quoted in text at note 77 *supra*.

152. See Economic Analysis, *supra* note 2, at 22-23.